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STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN ASSOCIATION OF GOVERNMENTAL EMPLOYEES, a Michigan nonprofit membership corporation,

Plaintiff-Appellee,

v

STATE OF MICHIGAN AND OFFICE OF THE STATE EMPLOYER,

Defendants-Appellants.
_____/

Supreme Court No. 147511

Court of Appeals No. 304920

Court of Claims No. 10-000037-MK

SUPPLEMENTAL BRIEF FOR THE STATE OF MICHIGAN AND THE OFFICE OF THE STATE EMPLOYER

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

On February 3, 2016, this Court entered an order granting oral argument on the Defendants-Appellants' application and directed the parties to brief the following question:

1. Given that the Civil Service Commission has constitutional authority to "fix rates of compensation" for the classified service, Const 1963, art 11, § 5, and given that the relief the plaintiff requests is not available unless the Civil Service Commission reconsiders its rate-setting decision, is the plaintiff's breach of contract claim cognizable in the Court of Claims?

   Trial Court's answer: The Trial Court did not consider this question.

   Appellant's answer: Appellant answers "No."

   Appellee's answer: Appellee answers "Yes."

   Court of Appeals' answer: The Court of Appeals did not consider this question.

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ARGUMENT

I. MAGE's breach-of-contract claim is not cognizable because the Civil Service Commission has rejected the pay raise MAGE seeks as damages and because only the Commission—and not the Court of Claims—has the authority to fashion a remedy for this type of claim.

A party asserting a breach of contract must establish (1) that a contract existed (2) which the other party breached (3) thereby resulting in damages to the party claiming breach. *Miller-Davis Co v Ahrens Const, Inc,* 495 Mich 161, 178 (2014). Here, as the State Defendants explained in their application, no contract exists, no breach occurred, and even if a breach had occurred, it did not cause any damages (because the ultimate decisionmaker, the Commission, rejected the desired pay increase even after receiving the very pay-increase recommendation MAGE sought). But even if those elements had been satisfied, the claim would still not be cognizable in the Court of Claims because the Court of Claims cannot order the Civil Service Commission to fix a particular rate of compensation via a damages award.

A. Under the doctrine of primary jurisdiction, challenges to a rate of compensation established by the Commission must be resolved by the Commission, and are not within the jurisdiction of the Court of Claims.

As explained in the application for leave to appeal (at pp. 9-11), the Constitution grants the Civil Service Commission authority over certain matters of state employment. Specifically, the Constitution gives the Commission the authority to "fix rates of compensation for all classes of positions" in the state classified service—that is to set salaries and wages. Const 1963, art 11, § 5;

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Coalition of State Employee Unions v State of Michigan, 498 Mich 312, 323 (2015). The Commission also possesses authority to establish procedures for resolving employee grievances, as well as rates of compensation and conditions of employment, and has the authority to adopt rules to govern its resolution of employee disputes. *UAW v Green,* 498 Mich 282, 288, 289 (2015); *Viculin v Dep't of Civil Serv,* 386 Mich 375, 393 (1971) (recognizing that the Commission "may determine, consistent with due process, the procedures by which a State Civil Service employee may review his grievance"); Civil Service Commission Rules 6-2 Employee-Employer Relations System.

Under the doctrine of primary jurisdiction, complaints about rates of compensation must be addressed in the first instance by the Commission's processes under the Civil Service Rules. E.g., *Rinaldo's Const Corp v Michigan Bell Tel Co*, 454 Mich 65, 70 (1997). An enterprising plaintiff cannot evade that limitation simply by labeling its complaint as a breach-of-contract claim. And judicial review of that agency decision is appropriate only as appellate review, which lies only in the circuit court, not the Court of Claims. MCL 600.6419(5) ("This chapter does not deprive the circuit court of exclusive jurisdiction over appeals from . . . administrative agencies as authorized by law"); MCR 7.105. MAGE's claim that it is entitled to a certain rate of compensation for fiscal year 2011 is therefore not cognizable in the Court of Claims.

This reasoning applies with extra force to MAGE, as MAGE is itself a creature of the Civil Services Rules. MAGE is a limited recognition organization

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(LRO) that does not and cannot engage in collective bargaining on behalf of state classified employees; it cannot, for example, enter into collectively bargained labor contract agreements on behalf of state classified employees. CSC Rule 6-2.2 Limited Recognition Organizations. As a result, MAGE's role is limited to only those rights and obligations provided in the civil service rules and regulations. CSC Rule 6-8.3.

One of the rights MAGE does have as a limited recognition organization is that it may file an unfair-labor-practice action related to these rights and obligations. CSC 6-13, Unfair Labor Practice Procedures. Here, MAGE did just that, and it obtained the relief made available under the Commission's Rules—a determination that the employer engaged in an unfair labor practice when it failed to recommend the 3% pay increase to the Coordinated Pay Panel. The Court of Claims thus is prohibited from awarding damages in this instance because the Commission has determined the relief to be provided to MAGE and its members, and the Court of Claims has no jurisdiction to review that decision.

B. The separation-of-powers doctrine prohibits the Court of Claims from fashioning a remedy in this case.

Any attempt to fashion a judicial remedy on the breach-of-contract claim alleged here must fail, to avoid violating the separation of powers by circumventing the constitutional authority of the Civil Service Commission to fix rates of compensation and to regulate a grievance process. Pursuant to that authority, the Commission has chosen the process for fixing rates of compensation for non-

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exclusively represented state employees and adopted Rules governing employer-employee relations in that process. This includes the Rules applicable to limited recognition organizations such as Plaintiff, as discussed above.

Our government's powers have been carefully apportioned between three distinct branches with powers defined and limited by constitution. Const 1963, art 3, § 2. The apportionment of power to one branch is understood to be a prohibition of its exercise by either of the others. *People ex rel Sutherland v Governor,* 29 Mich 320, 324, 325 (1874). The Commission's authority is, as this Court has recently reiterated, "part of the executive branch power." *Coal. of State Emp. Unions*, 498 Mich at 329.

If the Court of Claims were to set a rate of compensation, as MAGE effectively requests here, that action would impermissibly intrude into the Commission's sphere of authority, and as this Court explained just last year, "any . . . judicial attempt at incursion into that 'sphere' would be unavailing." *Id.* Awarding damages in this context would be intruding into the Commission's sphere of authority. MAGE's breach-of-contract claim directly attempts to establish a rate of compensation for the relevant year, because the only wrong asserted is that the rate of pay was not what it should have been—put simply, MAGE contends that the employer failed to comply with the terms of the Consensus Agreement and to support a 3% pay-increase recommendation to the Coordinated Compensation Panel. Thus, any judicial remedy of this claim would intrude upon a power entrusted by the Constitution to the Commission and not to the courts. And that

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same judicial remedy would also intrude on the one check and balance that the Constitution imposes on the Commission's authority, namely, the constitutional authority of the Legislature (not the courts) to reject or reduce increases in rates of compensation authorized by the Commission. Const 1963, art 11, § 5, cl 7. In fact, this situation would violate the separation of powers just as much as an order compelling the Legislature to appropriate funds would. See *Musselman v Governor*, 448 Mich 503, 522 (1995) (recognizing that "this Court lacks the power to require the Legislature to appropriate funds"), on reh'g, 450 Mich. 574 (1996), overruled on other grounds by *Studier v Michigan Pub Sch Employees' Ret Bd*, 472 Mich 642, 647 (2005).

This is not to say that a damages award is always the equivalent of a rate of compensation and therefore never possible against the Commission; for example, if the Commission awarded different pay to different state employees based on the employees' race, then damages would be possible, but the damages would be for the equal-protection violation, rather than simply setting a rate of compensation.

Accordingly, because the Commission rejected the 2% pay increase for FY 2011, and MAGE litigated its claim pursuant to the Commission's Rules, the Constitution's separation of powers prevents MAGE's claim from being cognizable in the Court of Claims.

CONCLUSION AND RELIEF REQUESTED

The Civil Service Commission, exercising its constitutional authority, rejected the 3% pay increase for non-exclusively represented employees in the state

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classified service for fiscal year 2011. Plaintiff's claim related to the State Employer's rescission of an earlier agreement under which they would jointly recommend this 3% raise was separately resolved under the process adopted by the Civil Service Commission related to its authority to regulate employer-employee relations. Plaintiff's members were treated no differently than the other non-exclusively represented employees who did not belong to the organization.

Because the Commission provided the process for the resolution of Plaintiff's claims and separately rejected the 3% pay increase, neither the Plaintiff nor its members are entitled to damages. Because the Court of Claims is unable to fashion appropriate and effective relief, this breach-of-contract claim is not cognizable and must be dismissed.

Respectfully submitted,

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